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Judgment of the Court of 15 February 2000. - Commission of the European Communities v French Republic. - Social security - Finance - Legislation applicable. - Case C-169/98.

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Summary

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Keywords

Social security for migrant workers - Equal treatment - General social contribution levied by a Member State on its residents working in another Member State - Not permissible

(EC Treaty, Arts 48 and 52 (now, after amendment, Arts 39 EC and 43 EC); Council Regulation No 1408/71, Art. 13)

Summary

\$\$A Member State fails to fulfil its obligations under Article 13 of Regulation No 1408/71 and under Articles 48 and 52 of the Treaty (now, after amendment, Articles 39 EC and 43 EC) if it applies a general social contribution - the proceeds of which are allocated to the bodies responsible for paying old-age benefits, survivor's benefits, sickness benefits and family allowances - on the employment income and substitute income of employed and self-employed persons resident in that State but working in another Member State who, by virtue of that Regulation, are not subject to the social security legislation of the State of residence.

Where such a contribution is allocated specifically and directly to financing the social security scheme of that State, it falls within the scope of Regulation No 1408/71 and constitutes a levy covered by the prohibition against double contributions laid down in Article 13 of that Regulation and the provisions of the Treaty that Article 13 is designed to implement.

That conclusion is not undermined by the fact that payment of the contribution does not give entitlement to any direct and identifiable benefit in return, by the limited number of the workers

concerned, or by the fact that the rate of the levy is minimal.

(see paras 31, 34-35, 37-38, 45-46, 48 and operative part)

Parties

In Case C-169/98,

Commission of the European Communities, represented by P. Hillenkamp, Legal Adviser, and H. Michard, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and C. Chavance, Secretary for Foreign Affairs in the same Directorate, acting as Agents,

defendant,

APPLICATION for a declaration that, by applying the general social contribution to the employment income and substitute income of employed and self-employed persons resident in France but who, by virtue of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), are not subject to French social security legislation, the French Republic has failed to fulfil its obligations under Articles 48 and 52 of the EC Treaty (now, after amendment, Articles 39 EC and 43 EC) and Article 13 of the said regulation,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida (Rapporteur), D.A.O. Edward, L. Sevón, R. Schintgen (Presidents of Chambers), C. Gulmann, J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: A. La Pergola,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 4 May 1999,

after hearing the Opinion of the Advocate General at the sitting on 7 September 1999,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 7 May 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by applying the general social contribution (contribution sociale généralisée, the CSG) to the employment income and substitute income of employed and self-employed persons resident in France but who, by virtue of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1, Regulation No 1408/71), are not subject to French social security legislation, the French Republic has failed to fulfil its obligations under Articles 48 and 52 of the EC Treaty (now, after amendment, Articles 39 EC and 43 EC) and Article 13 of the said regulation.

The Community rules

2 Article 4(1) and (2) of Regulation No 1408/71 provides:

1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivor's benefits;

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;

(g) unemployment benefits;

(h) family benefits.

2. This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or shipowner in respect of the benefits referred to in paragraph 1.

3 Article 1(j) of Regulation No 1408/71 defines the term legislation as meaning in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4(1) and (2) or those special non-contributory benefits covered by Article 4(2a).

4 Article 13 of the regulation provides:

1. Subject to Article 14c, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

(b) a person who is self-employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State;

....

The national rules

5 The CSG was introduced by Finance Law No 90-1168 of 29 December 1990 (*Journal Officiel de la République Française*, 30 December 1990, p. 16367). The relevant provisions relating to the CSG, namely Articles 127 to 135 of that Law, were incorporated in the Social Security Code (Articles L.136-1 to L.136-9) by Law No 93-936 of 22 July 1993 on retirement pensions and the safeguarding of social protection (*JORF*, 23 July 1993, p. 10374).

6 All natural persons domiciled in France for income tax assessment purposes are liable to pay the CSG, in particular on their employment income or substitute income.

7 For the purposes of Article 4B of the General Tax Code, persons whose home or principal place of residence is in France, persons who are employed or self-employed in France, unless they prove that that employment is on an ancillary basis, and persons for whom France is the centre of their economic activities are deemed to be domiciled in France for tax purposes.

8 The CSG is charged on income from assets, investment income, sums wagered or winnings, as well as employment income and substitute income, including that received abroad or from a foreign source, subject to international conventions on the avoidance of double taxation concluded by the French Republic.

9 Law No 96-1160 of 27 December 1996 on the funding of social security for 1997 (*JORF*, 29 December 1996, p. 19369) enlarged the assessment basis for the CSG as regards employment income and substitute income, so as to align it for the most part with the assessment basis for the social debt repayment contribution which is the subject of another case in which judgment has been delivered today (Case C-34/98 *Commission v France*). The CSG thus applies to wages, professional fees, retirement and invalidity pensions and unemployment allowances.

10 Pursuant to Article L. 136-8 III of the Social Security Code, as amended by Law No 96-1160, the proceeds of the CSG are paid to the Caisse Nationale des Allocations Familiales (National Family Allowances Fund), the Fonds de Solidarité Vieillesse (Old-Age Solidarity Fund) and the compulsory sickness insurance schemes.

11 In so far as it applies to employment income and substitute income, the CSG is collected by the institutions responsible for collecting contributions to the general social security scheme, according to the rules and with the guarantees and penalties applicable to the collection of contributions to the general scheme for the same category of income. For the purposes of applying those provisions, frontier workers were asked to register with the agencies of the Union de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales (Union for the Collection of Social Security and Family Allowance Contributions).

Pre-litigation procedure

12 *By letter of formal notice of 25 November 1994, the Commission requested the French Government to submit observations on the compatibility with Community law of applying the CSG to the employment income and substitute income of employed and self-employed persons residing in France but working in another Member State, who are not, by virtue of Regulation No 1408/71, subject to French social security legislation.*

13 *By letter of 22 March 1995, the French authorities replied that they did not share the Commission's views with regard to the connection between the CSG, a social contribution, and the scope of Regulation No 1408/71, particularly the rule in Article 13 that the legislation of a single Member State is to apply. On 28 November 1994 the French Government nevertheless decided to suspend the administrative procedures for the collection of the CSG as regards persons with employment income and income substitution benefit from a foreign source with a view to reforming the legislation in question.*

14 *Following that suspension, the Commission deferred a decision on bringing an action under Article 169 of the Treaty for failure to fulfil Treaty obligations and, by letter of 21 March 1996, Commission staff asked the French authorities to inform them of the situation with regard to the collection of the CSG from the workers concerned and the reforms which had been announced.*

15 *The Commission considered the French Government's reply to be unsatisfactory and, by letter of 6 October 1996, again asked the French authorities to inform it within one month of the situation with regard to the collection of the CSG from the workers concerned and the reforms envisaged. No reply to that letter was received.*

16 *On 16 December 1997, the Commission sent the French authorities a reasoned opinion to the effect that, by applying the CSG to the employment income and substitute income of workers resident in France but who, by virtue of Regulation No 1408/71, were not subject to French social security legislation, the French Republic was failing to comply with Articles 48 and 52 of the Treaty and Article 13 of that Regulation. The Commission asked the French Republic to comply with the reasoned opinion within two months of its notification.*

17 *Since the French authorities failed to comply with the reasoned opinion within the period allowed, the Commission decided to bring the present action.*

The action

18 *This action concerns the levying of the CSG only in so far as it relates to the employment income and substitute income obtained by employed and self-employed persons resident in France and taxable in that Member State, in connection with employment, present or past, in another Member State. Such persons are covered by the social security scheme of the State of employment in accordance with Regulation No 1408/71.*

19 *According to the Commission, that charge is a double social security levy contrary both to Article 13 of Regulation No 1408/71 and to Articles 48 and 52 of the Treaty.*

Infringement of Article 13 of Regulation No 1408/71

20 *The Commission submits that the CSG, which is intended to contribute to the financing of several branches of the general French social security scheme listed in Article 4 of Regulation No 1408/71, is a social security contribution which falls within the scope of that regulation. In that connection the means of collecting the CSG and the rules governing disputes arising from liability*

to pay that contribution, which are those applicable to social security contributions, confirm that connection between the CSG and Regulation No 1408/71. Moreover, the fact that the CSG assessed on employment income and substitute income is, pursuant to Finance Law No 96-1181 of 30 December 1996 (JORF, 31 December 1996, p. 19490), in part deductible from income tax reinforces the view that the levy is in the nature of a social security contribution falling within the scope of Regulation No 1408/71.

21 Consequently, according to the Commission, by levying the CSG on the employment income and substitute income of employed and self-employed persons resident in France obtained in relation to employment in another Member State, the French Republic is disregarding the rule set out in Article 13 of Regulation No 1408/71 that the legislation of a single State is to apply, in so far as that same income has already borne all the social charges imposed in the Member State of employment, whose legislation is the sole legislation applicable by virtue of Article 13.

22 The French Government contends that the right to social protection is one of the citizen's fundamental rights. Such protection must at the same time cover the entire population and be at a high level, whilst its cost must be shared equitably between citizens.

23 It considers that the latter objective should not be attained by financing founded on social security contributions based on employment income alone but must involve all income. The CSG, together with the social debt repayment contribution which is the subject of the judgment in Case C-34/98 *Commission v France*, referred to above, constitutes measures adopted in the context of the move towards funding social security by taxation.

24 By reason of its characteristics and purpose, the CSG should be categorised as a tax, thereby falling outside the scope of Regulation No 1408/71 and remaining within the ambit of the Member States' own responsibilities in budgetary and social policy matters.

25 In support of its argument, the French Government points out in particular that the CSG is payable on the basis of the single criterion of domicile for tax purposes in France, whatever the occupational status of the person concerned or social security system to which he belongs. Moreover, persons subject to the CSG do not receive any social security benefit in return for that contribution, whereas all persons resident in France, whether or not they are employed, may, on account of that residence, enjoy the social benefits financed by the CSG and which form part of the national solidarity scheme, namely family benefits and benefits from the *Fonds de Solidarité Vieillesse*. Neither the means of collecting the proceeds of the CSG nor the way in which they are allocated constitutes a relevant criterion for application of the principle that the legislation of a single Member State is to apply.

26 The French Government points out that Regulation No 1408/71 does not contain any definition of the term social contributions and leaves the Member States free to choose the various methods of organisation and funding for their social security systems.

27 If, as the Commission states, the system of social security funding in Denmark, which is based mainly on tax, is compatible with Community law, the same should apply in respect of the CSG. It would, of course, have been possible to ensure that the social security branches concerned were financed by an increase *inter alia* in income tax, which would have to be paid by frontier workers resident in France as well. The French Republic did not choose such a system, which would lack visibility as far as taxpayers were concerned and would therefore be likely to a large extent to frustrate the objective pursued.

28 Lastly, the French Government contends that the CSG does not constitute a measure the purpose of which is to compensate for the fact that frontier workers do not belong to and therefore

do not contribute to the French social security scheme, pursuant to Regulation No 1408/71. The rate of the CSG represents 7.5% of pay, whilst the total of the sums levied relating to social contributions amounts to 42% of the pay of those liable.

29 As the Court has held, however, the fact that a worker is required to pay, in respect of the same earned income, social charges arising under the legislation of several States, although he can be an insured person only in respect of the legislation of one State, means that the worker must pay contributions twice over, contrary to the provisions of Article 13 of Regulation No 1408/71 (see in particular Case 102/76 Perenboom [1977] ECR 815, paragraph 13, and Case C-60/93 Aldewereld [1994] ECR I-2991, paragraph 26).

30 It is common ground that the persons concerned by this infringement action, namely Community nationals resident in France but who, because they work in another Member State, pursuant to the provisions of Article 13 of Regulation No 1408/71, are insured persons under the legislation of the State of employment alone, are required, subject, where applicable, to conventions on the avoidance of double taxation concluded by the French Republic, to pay, in respect of income relating to their work in the Member State of employment, not only the social charges arising from the application of the latter's social security legislation, but also the social charges, in this case the CSG, arising from the application of the legislation of the Member State of residence.

31 The argument of the French Government to the effect that since the CSG is really to be categorised as a tax it falls outside the scope of Regulation No 1408/71 and accordingly is not caught by the prohibition against overlapping legislation cannot be accepted.

32 The fact that a levy is categorised as a tax under national legislation does not mean that, as regards Regulation No 1408/71, that same levy cannot be regarded as falling within the scope of that regulation and caught by the prohibition against overlapping legislation.

33 As the Court has held, in particular in Case C-327/92 Rheinhold & Mahla [1995] ECR I-1223, paragraph 15, Article 4 determines the matters covered by Regulation No 1408/71 in terms which make it clear that the national social security schemes are subject in their entirety to the application of the rules of Community law. At paragraph 23 of that judgment the Court stated that the decisive factor for the purposes of applying Regulation No 1408/71 is that there must be a link between the provision in question and the legislation governing the branches of social security listed in Article 4 of Regulation No 1408/71, and that that link must be direct and sufficiently relevant.

34 As the Commission rightly maintains, there is such a direct and sufficiently relevant link between the CSG and the legislation governing the branches of social security listed in Article 4 of Regulation No 1408/71 so that it can be regarded as a levy covered by the prohibition against double contributions.

35 As the Advocate General noted at points 25 and 26 of his Opinion, in contrast to levies designed to meet general public charges, the CSG is allocated specifically and directly to financing social security in France, the corresponding revenue being allocated to the Caisse Nationale des Allocations Familiales, the Fonds de Solidarité Vieillesse and the compulsory sickness schemes. The purpose of the CSG is therefore to finance more particularly the branches which concern old-age, survivors', sickness and family benefits, which are covered by Article 4 of Regulation No 1408/71.

36 That link between the CSG and the legislation governing social security in France is also clearly revealed by the fact that, as the French Government itself asserts, the levy replaces in part social

security contributions which were a heavy burden on low and medium levels of pay, and means that an increase in existing contributions can be avoided.

37 The fact that payment of the CSG does not give entitlement to any direct and identifiable benefit in return does not undermine that conclusion.

38 For the purposes of the application of Article 13 of Regulation No 1408/71, the decisive criterion is that of the specific allocation of a contribution to the funding of the social security scheme of a Member State. Whether benefits are obtained in return or not is therefore irrelevant in this connection.

39 In the light of those considerations, the first of the Commission's objections is well founded.

Infringement of Articles 48 and 52 of the Treaty

40 According to the Commission, taxpayers resident in France and covered by the French social security scheme are in a situation that is different from that of taxpayers who are resident in that Member State but, having exercised their rights to free movement and freedom of establishment laid down in Articles 48 and 52 of the Treaty respectively, are required to contribute to the funding of the social security scheme of another Member State pursuant to Regulation No 1408/71. By failing to take that difference into account, the French Republic is in breach of the principle of equal treatment laid down in those provisions.

41 For the French Government, in contrast, workers in receipt of employment income or substitute income in another Member State are, as regards the CSG, in a situation comparable to that of workers receiving such income in France, so that no discrimination has been introduced with regard to the former. First of all, the rate of and assessment basis for the CSG are identical for all residents in France, whatever their nationality, who are subject to tax on their income from a foreign source. According to the French Government, the CSG is thus an integral part of a tax system that is wholly consistent with regard to residents taxable in France. Secondly, the CSG falls within the scope of the bilateral conventions on the avoidance of double taxation concluded by the French Republic which give entitlement to tax credits or exemption for income from a foreign source in order to eliminate any double taxation. Lastly, the French Government points to the low rate of the levy in question which, since 1 January 1998, has been 7.5% on pay and 6.2% on substitute income.

42 Even if the CSG is applicable in the same way to all residents in France, however, those who work in another Member State and who, in accordance with Article 13 of Regulation No 1408/71, contribute to the funding of the social security scheme of that State are being required in addition to finance, even if only partially, the social security scheme of the State of residence, whereas all other residents are exclusively required to contribute to the latter State's scheme.

43 The rule laid down in Article 13 of Regulation No 1408/71 that the legislation of a single Member State is to apply in matters of social security is aimed specifically at eliminating unequal treatment which is the consequence of partial or total overlapping of the legislation.

44 As is clear from the tenth recital in the preamble to Regulation No 1408/71, the principle that the legislation of a single Member State is to apply is aimed at guaranteeing the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible.

45 It follows from the foregoing that, as the Advocate General noted in point 35 of his Opinion, in putting forward this objection the Commission is only focusing, in the light of Articles 48 and 52, on the same infringement as that found in the context of Article 13 of Regulation No 1408/71. Since

the CSG scheme is at the origin of the unequal treatment contrary to that article, it disregards to the same degree the provisions of the Treaty that Article 13 is designed to implement. The unequal treatment thus found constitutes an obstacle to the free movement of workers for which, in view of Article 13 of Regulation No 1408/71, there can be no justification.

46 As regards the argument of the French Government to the effect that in any event the CSG only affects a limited number of the workers concerned by this action on account of bilateral conventions on the avoidance of double taxation concluded by the French Republic, and that the rate of the contested levy is minimal, it need merely be observed that, according to the case-law of the Court, the articles of the Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited (see in particular Case C-49/89 Corsica Ferries France [1989] ECR 4441, paragraph 8).

47 The Commission's second objection is therefore also well founded.

48 It follows from all the above considerations that, by applying the CSG to the employment income and substitute income of employed and self-employed persons resident in France but who, by virtue of Regulation No 1408/71, are not subject to French social security legislation, the French Republic has failed to fulfil its obligations under Article 13 of that regulation and under Articles 48 and 52 of the Treaty.

Decision on costs

Costs

49 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked that the French Republic be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs.

Operative part

On those grounds,

THE COURT

hereby:

1. Declares that, by applying the general social contribution to the employment income and substitute income of employed and self-employed persons resident in France but who, by virtue of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, are not subject to French social security legislation, the French Republic has failed to fulfil its obligations under Article 13 of that regulation and under Articles 48 and 52 of the EC Treaty (now, after amendment, Articles 39 EC and 43 EC);

2. Orders the French Republic to pay the costs.